No. 10-631

Supreme Court, U.S.
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In The
Supreme Court of the United States

FRANK CUSTABLE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government's brief is more noteworthy for what it lacks than what it contains. While not disputing that the circuits are firmly divided on both questions presented in the petition, it defends the Seventh Circuit's approach only in conclusory terms. See Op. 12-13.[1] Nowhere does the government address this Court's *ex post facto* jurisprudence. While relying on the advisory nature of the Guidelines as a reason for avoiding petitioner's *ex post facto* claim, the government does not cite, let alone address, cases such as *Garner v. Jones*, 529 U.S. 244, 255 (2000), or *California Department of Corrections v. Morales*, 514 U.S. 499, 509 (1995), which make clear that the relevant *ex post facto* test is whether there is a "substantial risk" that retroactive application of a penal law will increase punishment. See Pet. 25-26. Nor has the government addressed statistics demonstrating the practical viability of the *ex post facto* objection in this case.

The government attempts to divert attention by positing a plain error theory. But this "defense" is not

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[1] The government notes that the *ex post facto* issues presented in Questions 1 and 2 of the petition are also before this Court in *Ortiz v. United States*, No. 10-7719 (Question 1), in which the government filed its opposition on the same day as it filed the opposition brief in this case, and *Kumar v. United States*, No. 10-961 (Question 2), in which the government's response to the certiorari petition is presently due by March 30, 2011.

invoked on Question 1 of the petition. Concerning Question 2, the plain error rule is inapplicable because petitioner brought his *ex post facto*-based objection to the attention of the district court and the court of appeals. See Fed. R. Crim. P. 51(b).

I. The Government Has Not Dispelled That The Circuit Split Over The Role Of The *Ex Post Facto* Clause In Post-*Booker* Sentencings Is In Urgent Need Of This Court's Resolution

The government admits that "the courts of appeals are divided" on the question of whether, in the aftermath of *United States v. Booker*, 543 U.S. 220, 262 (2005), retroactive application of more onerous Guidelines violates the *Ex Post Facto* Clause. Opp. 10. In its sparing defense of the Seventh Circuit's approach, the government references its "response to other recent petitions for writs of certiorari." *Id.* Cited here is the government's response in *Hensley v. United States*, 130 S. Ct. 1284 (2010) (No. 09-480), 2010 WL 603304, at 6-9. Petitioner, too, cited the certiorari proceedings in *Hensley*, noting that the government in that case had acknowledged a circuit split, but sought more time to advance its position in the courts of appeal.[2] In its brief, the government does

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[2] The government maintains that the petition suggested that the Third Circuit has resolved the issue in *United States v. Wood*, 486 F.3d 781 (3d Cir. 2007). Opp. 13 n. 5. Petitioner did not go that far. See Pet. 15.

not address significant developments since this Court denied certiorari in *Hensley*, namely, that the government has unsuccessfully petitioned certain courts of appeals to fall in line with *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006). Although not mentioned in the government's brief, since the filing of the petition in this case, the Sixth Circuit denied the Solicitor General's petition for rehearing en banc in *United States v. Lanham*, 617 F.3d 873 (6th Cir. 2010) (Rehearing and Rehearing En Banc Denied Dec. 17, 2010).

The government essentially contends that *Booker* sub silentio overruled *Miller v. Florida*, 482 U.S. 423 (1987). According to the government, *Booker* and later cases have made clear that the Guidelines lack the "force and effect of laws." Opp. 11. But the effect of *Booker* on *ex post facto* analysis *is* the question presented here. Moreover, the Guidelines still play an important role in post-*Booker* sentencings, as they did below where the district court imposed a sentence within the Guidelines range. As this Court recently stated in *Pepper v. United States*:

> [W]e have recognized that the Commission post-*Booker* continues to "fil[l] an important institutional role" because "[i]t has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." *Kimbrough*, 552 U.S., at 109, 128 S.Ct. 558 (internal quotation marks omitted). Accordingly, we have instructed that district courts must still give "respectful

> consideration" to the now-advisory Guidelines (and their accompanying policy statements). *Id.*, at 101, 128 S.Ct. 558.

No. 09-6822, 2011 WL 709543, *15 (March 2, 2011).

Furthermore, *Booker* did not and could not change the structure of the Guidelines, i.e., that they are "laws" implemented by Congress. See Pet. 3-4. Nor has the government cited any court of appeals case holding that the Guidelines are no longer "laws." Even *Demaree* found that Congress could not evade *ex post facto* prohibitions "by delegating penal authority to an agency." *Demaree*, 459 F.3d at 793.

To be sure, the argument in favor of displacing the *Ex Post Facto* Clause in federal sentencing depends on the Guidelines' advisory nature. In *Garner*, however, this Court determined that the prohibition against *ex post facto* laws does not lose relevance just because an element of discretion is involved in the decision-making process. As noted, the government does not cite or discuss *Garner*.

II. The Record Does Not Support The Government's Argument That The District Court Would Have Imposed The Same Sentence In The Face Of Lower Guidelines And If There Is Error In Petitioner's Guideline Calculation It Would Be For The District Court To Refashion The Sentence In The First Instance

A. The government invokes a harmless error argument of sorts. It maintains that the district court

"would have imposed the same sentence even if it had used the 2001 Guidelines as petitioner requested." Opp. 14. The record, however, simply does not support the government's position. *At no time did the district court state that it would have imposed the same sentence if the applicable advisory sentencing range had been lower.* Nor did the district court articulate any reasons as to why a sentence above the low-end of the applicable Guidelines range would be appropriate. It is also clear that the 2008 Guidelines played a significant role in the court's choice of sentence. The court sua sponte continued the sentencing hearing, in part, because it "need[ed] time . . . to think in terms of the guidelines." Pet.App. 59. The district court commenced the next court appearance (at which it imposed sentence) by stating that it had "been over what the guidelines are as set forth in the presentence report." Pet.App. 61-62. The court further noted "that the advisory guideline range is quite high, 262 months to 327 months." Pet.App. 53. In sentencing petitioner to 262 months in prison, the district court did not select the prison term sentence out of "thin air," *United States v. Turner*, 548 F.3d 1094, 1100 (D.C. Cir. 2008) – it *was* the low-end of the sentencing range under the 2008 Guidelines. After the court imposed the 262-month sentence, petitioner's counsel remarked that the sentence did not "provide for any departure from the bottom of the guideline range" based on 18 U.S.C. § 3553(a) factors and petitioner's cooperation. Pet.App. 69. In response, the court stressed, "I think the guideline sentence is the appropriate sentence in this case." Pet.App. 71.

Lastly, under this Court's decision in *Gall v. United States*, 552 U.S. 38, 49 (2007), a sentencing court has an obligation to compute the Guidelines correctly as the first step in the sentencing process. If petitioner is correct in his *ex post facto* contention, then serious procedural error – which is not otherwise cured by the district court's pronouncements in this case – infects the sentencing proceeding in this case. See *United States v. Lewis*, 606 F.3d 193, 200 (4th Cir. 2010); Pet. 17.

B. The government advances an exotic but undeveloped law of the case argument. See Opp. 9 n. 3 & 14. The government concedes that the 2001 Guidelines, and 2002 Guidelines for that matter, set the base offense level at Level 6 for the fraud convictions, as opposed to the Level 7 found by the district court using the 2008 Guidelines. Petitioner argued in the court of appeals that the base level should have been set at Level 6 because he did not face a 20-year maximum prison sentence for his fraud convictions, as required to increase the base offense level to Level 7 under U.S.S.G. § 2B1.1(a)(1) (2008). See Opp. 7. This argument was separate from petitioner's *ex post facto* objection. See *United States v. Custable*, No. 09-2593, Deft's Brief, pp. 12-17. In the court of appeals, the government conceded error on petitioner's Guidelines-based objection, but the Seventh Circuit did not

accept the concession and refused to remand on the basis of the plain error doctrine.[3] Pet.App. 4-5.

If petitioner is correct in his *ex post facto* argument, then the base offense level undisputedly would be one-level lower than that found by the district court. If error infects the sentence, then the sentence ought to be vacated in its entirety, and left for the sentencing judge to address the effect of the error. Cf. *Pepper*, 2011 WL 709543, *18; *Greenlaw v. United States,* 554 U.S. 237, 253-54 (2008); *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Indeed, this Court normally formulates the legal rule in a given case – here, whether the *Ex Post Facto* Clause applies at post-*Booker* sentencings – and leaves harmless error consideration for the lower courts. E.g., *Neder v. United States*, 527 U.S. 1, 25 (1999); cf. *Black v. United States*, 130 S. Ct. 2963, 2970 (2010); *Skilling v. United States*, 130 S. Ct. 2896, 2934 (2010). The law of the case doctrine would not bind the district court from Guidelines recalculation, *Pepper*, 2011 WL 709543, *18-19, including acceptance of the government's concession regarding the grouping error in this case. See Opp. 9 n. 3. That the court of appeals refused to remand on a separate unpreserved issue

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[3] The government does not invoke plain error as to Question 1. Petitioner's guilty plea declaration, Pet.App. 45-46, sentencing memorandum/PSR objections, R. 338, and motion to correct sentence, R. 352, all raised *ex post facto* objections to application of the 2008 Guidelines. Petitioner's written objections sufficed to preserve the point. See, e.g., *United States v. Smith*, 332 F.3d 455, 458 (7th Cir. 2003).

thus does not pose an impediment to this Court's review.

III. Plain Error Review Of Question 2 Is Inapplicable Because Petitioner Brought His Ex Post Facto Objection To The Lower Courts' Attention

The government attempts to avoid full merits review of Question 2 on plain error grounds. Rule 52(b) of the Federal Rules of Criminal Procedure provides, "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

To avoid forfeiture, a litigant must "make timely assertion of the right before a tribunal having jurisdiction to determine it." *Puckett v. United States*, 129 S. Ct. 1423, 1428 (2009) (quoting *Yakas v. United States*, 321 U.S. 414, 444 (1944)); see also *Johnson v. United States*, 520 U.S. 461, 465 (1997); *United States v. Olano*, 507 U.S. 725, 731 (1993). Rule 51(b) of the Federal Rules of Criminal Procedure describes a litigant's responsibilities in this regard:

> A party may preserve a claim of error by informing the court – when the court ruling or order is made or sought – of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection.

Puckett discussed the reasons for the plain error rule:

> This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from "'sandbagging'" the court – remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.

129 S. Ct. at 1428.

The government does not and cannot contend that petitioner failed to "inform[ ] the court . . . of the action the party wishe[d] the court to take." Both in the written guilty plea declaration, Pet.App. 45-46, and his written pre-sentencing submission, R. 338, petitioner informed the district court that he sought to be sentenced under the 2001 Guidelines (which called for an offense level 3 levels lower than the 2008 Guidelines). Petitioner also informed the court of the "grounds for the objection," i.e., the *Ex Post Facto* Clause's prohibition against retroactive application of disadvantageous penal provisions. Accordingly, the PSR expressly recognized that the 2002 Guidelines

were more favorable to the defendant.[4] PSR 8, 29. And in his motion to correct sentence, which the district court addressed on the merits, petitioner re-asserted his *ex post facto*-based objection. R. 352.

In addition, both in his sentencing memorandum, R. 338, and his court of appeals brief, Deft's Brief, p. 34, petitioner generally cited the Guidelines provision containing the "one-book rule," U.S.S.G. § 1B1.11. Petitioner's goal was to have his Guidelines calculated on the basis of lower, more advantageous Guidelines, and § 1B1.11(b)(1) recognizes that Guidelines potentially may violate the *Ex Post Facto* Clause. Thus, the underlying *ex post facto* ground for petitioner's objection was brought to the lower courts' attention. That petitioner did not emphasize the aspect of the Guideline that might aid the government's position does not transform the nature of petitioner's objection, or work forfeiture of his *ex post facto* rights. See, e.g., *United States v. O'Neill*, 116 F.3d 245, 247 (7th Cir. 1997) (defendant "not required to adhere to any 'formalities of language and style' to preserve his objection"); cf. *United States v. Whitaker*,

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[4] The government maintains that the 2002 Guidelines, rather than 2001 Guidelines, is the germane earlier version of the Guidelines. Pet. 7-8. Insofar as this case is concerned, there is no material difference between the 2001 and 2002 Guidelines. Both produced an offense level 3 levels lower than that found by the district court. Although not discussed in the PSR, the parties here agree that the 6-level enhancement for more than 250 victims, U.S.S.G. § 2B1.1(b)(2)(C), did not go into effect until January 25, 2003.

127 F.3d 595, 601 (7th Cir. 1997) ("Citing the particular provision of the rule is not necessary if counsel states the reasons for the objection or . . . it is clear from context.").

Furthermore, both at the time of his sentencing and appeal, the Seventh Circuit was firmly entrenched in its post-*Booker ex post facto* position. Indeed, the Seventh Circuit has/had consistently refused to reconsider *Demaree*, see Pet. 14-15, and no judge on the Seventh Circuit has/had ever questioned the decision. Obviously, the district court lacked authority to overturn *Demaree*. Under the circumstances, elaborate arguments were not necessary to preserve petitioner's *ex post facto* objection. As stated in *United States v. Messino*, 382 F.3d 704, 714-15 (7th Cir. 2004) (Easterbrook, J., concurring):

> [T]he United States [has] contended that the defendants had not adequately preserved an argument based on *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and that our review therefore is limited to a search for plain error. All three members of the panel disagree with that position. Both [appellants] advanced in their opening briefs arguments based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which led to *Blakely* and *Booker*. True, appellants did not develop these arguments at length in either the district court or their appellate briefs, but the law was so firmly against them that elaboration would have been

> pointless. When precedent is adverse, a few sentences flagging the point suffice to preserve an argument for resolution by a higher court.

See also *Buchmeier v. United States,* 581 F.3d 561, 566 (7th Cir. 2009) (en banc).

Still more, the government acknowledges that the courts of appeals are divided on whether the *Ex Post Facto* Clause may prevent application of the "one-book rule." Opp. 19 n. 7. The Seventh Circuit's approach is encompassed in *United States v. Vivit,* 214 F.3d 908, 919 (7th Cir. 2000). As petitioner noted, Pet. 34, *Demaree* subsumes *Vivit*. If the *Ex Post Facto* Clause plays no role at a post-*Booker* sentencing, then the Clause necessarily would not preclude application of the "one-book rule." There is no question that petitioner repeatedly challenged and cited *Demaree* in the lower courts. Because the action petitioner sought – use of earlier Guidelines – and the ground for his objection – the *Ex Post Facto* Clause – were brought to the lower courts' attention, the plain error rule does not apply to Question 2.

Even if the plain error does apply, petitioner is eligible for relief. In view of this Court's treatment of the *Ex Post Facto* Clause, it is plain error to increase punishment through retroactive application of penal laws. E.g., *Miller*, 482 U.S. 423.[5] Here, retroactive

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[5] The government's theory that there cannot be plain error if the circuits are split, Pet. 19-20, is unsound, as it fails to

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application of U.S.S.G. § 2B1.1(b)(2)(C) (2008), resulted in a significant increased risk of additional punishment. That satisfies the third and fourth prongs of the plain error rule. Cf. *Glover v. United States*, 531 U.S. 198, 202 (2001) (government concedes that an increase in a prison term is prejudicial).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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recognize that the Constitution or a decision of this Court may be the foundation for a plain error. Under the government's view, no defendant would be entitled to relief from this Court if the circuits are split. While the government's position may state a rule for the courts of appeals, it does not state one for this Court.